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Chain Cycle Sdn Bhd v Kerajaan Malaysia

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(C)(A)-379–09 OF 2014
LIM YEE LAN, VARGHESE GEORGE AND IDRUS HARUN JJCA
8 OCTOBER 2015

C *Arbitration — Arbitrator — Finding of fact — Whether arbitrator's determination of quantum of damages due to respondent on counterclaim was determination of fact based on proper consideration of the law on the subject — Whether High Court on reference of questions relating to arbitral award could not interfere with and reduce quantum of damages awarded — Whether Absalom exception not confined only to situations where there was 'error of law on face of the award' but also to 'any question of law arising out of an award' under s 42 of the Arbitration Act 2005*

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E The appellant owned a technological process ('TOP') to treat municipal solid waste and entered into a contract with the respondent to design, construct, complete, test and commission a solid waste treatment plant. The technology involved combustion of the waste in a primary chamber and the burning off of toxic gases so produced in a secondary chamber. At its first testing, the plant failed to meet the performance specifications stated in the contract. Although

F certain modifications to the plant were made, it again failed the second test. The appellant claimed the failure was due to the waste not being in compliance with the types of waste specified in the contract and it declined to undertake further testing following disagreement over who should bear the costs of doing so. The respondent terminated the contract on the appellant's alleged

G repudiation of it. The appellant referred the dispute to arbitration contending, inter alia, that since it had completed all physical works for the plant, it was entitled to the balance of the revised contract price. The arbitrator ruled, inter alia, that: (a) the appellant, as a design-and-build contractor, had not substantially performed the contract but committed a breach which went to its

H root in failing to build a plant that was fit for the purpose for which it was constructed; (b) the contract between the parties was a commercial one and was not a 'research and development project'; (c) the respondent was entitled on its counterclaim to RM9,238,770 as costs for the replacement of the primary and secondary chambers; (d) the proper measure of damages in the instant case was

I 'diminution in value' or 'loss of utility' of the plant as it was difficult to ascertain its reinstatement costs; (e) the respondent was entitled to terminate the contract under cl 53.1(iii) when the appellant persistently refused to rectify the plant to meet the performance specifications; and (f) a proper testing and commissioning of the plant was not a condition precedent to the exercise by the

respondent of its right to terminate the contract. Pursuant to ss 42 and 37 of the Arbitration Act 2005 ('the AA'), the appellant referred ten questions pertaining to the arbitral award to the High Court for its determination. The High Court declined to interfere with the award except to halve — without offering any reasons — the damages awarded to the respondent on its counterclaim. The High Court held that the proper measure of damages in the instant case was on 'cost of reinstatement' basis and not 'diminution in value' of the plant. In the instant appeal, the respondent appealed against the reduction in the damages awarded on its counterclaim whilst the appellant appealed against the whole of the High Court's decision.

Held, dismissing the appellant's appeal and allowing the respondent's cross-appeal:

(1) The High Court judge misdirected himself when he interfered with and reduced the damages determined by the arbitrator on the respondent's counterclaim. The amount of damages in the award ordered in favour of the respondent had to be restored. The determination of the quantum of damages by the arbitrator was a determination of fact. He had addressed his mind to the right principles of law and had applied the test of what was a reasonable compensation in all the circumstances considering the particular complexity attached to this case, namely the fact that the technology inherent in the TOP plant belonged exclusively to the appellant and that rectification or replacement would be difficult and costly. By reducing the sum awarded as damages, the High Court judge stepped into the arena of the arbitrator and undertook a reassessment which he was not entitled to do, unless there was in the first place a proper reference under s 42 of the AA. The judge leaned on s 42(4)(b) of the AA as entitling him to do so. We could not agree to that. The power to 'vary' an award given there was clearly circumscribed by the opening words of s 42 to '… any question of law arising out of an award'. The arbitrator was the master of facts and the Court in exercising its powers under s 42 had to be wary to sieve out questions of fact 'dressed up' as questions of law (see paras 60–62).

(2) The *Absalom* exception was not confined to situations where the court was called upon to deal with 'error of law on the face of the award' only. There was no valid reason why, in a situation under s 42 of the AA where 'any question of law arising out of an award' was before the court, such an exception or limitation ought not to also apply. The restriction or limitation afforded by the *Absalom* exception was necessary and relevant even in a s 42 of the AA scenario so that the 'reference on question of law' under that provision was not turned into a wholesale 'appeal' against the arbitral tribunal's decision or ruling. The High Court judge accepted the respondent's contention that the arbitrator had already determined the question that the contract between the parties was a commercial one and

not a research and development project and hence that question was no longer amenable to curial intervention (see paras 26 & 31–33).

(3) There was no error on the part of the High Court or the arbitrator in ruling that the respondent had a valid basis in law to invoke cl 53.1(iii) to terminate the contract independent of cl 46. There was no merit in the appellant's complaint that the cl 53 relief was subject to the operation of cl 46. The plant failed to meet the quantity of waste treated and the consumption of fuel targets. The High Court also did not err in holding that the question of substantial performance of the contract was a question of fact and therefore it could not properly be made a subject of reference to the court. The court held that the arbitrator had correctly identified the law on substantial performance and ruled that the breach was one that went to the root of the contract, thus displacing the doctrine of substantial performance (see paras 45 & 48–50).

(4) The High Court had addressed the question on 'testing and commissioning' correctly from the perspective of the applicable legal principles as to what was or could have constituted the reasonable intention of the parties and the conclusion reached was sound that there did not arise any 'condition precedent' in the circumstances, as was canvassed by the appellant (see para 41).

[Bahasa Malaysia summary

Perayu memiliki proses teknologi ('PT') untuk merawat sisa pepejal perbandaran dan telah memasuki kontrak dengan responden untuk mereka bentuk, membina, menyiap, menguji dan memulakan operasi loji rawatan sisa pepejal. Teknologi melibatkan pembakaran sisa dalam bilik primer dan pembakaran gas toksik yang dihasilkan dalam bilik sekunder. Pada ujian pertama, kilang itu gagal memenuhi spesifikasi prestasi yang dinyatakan dalam kontrak. Walaupun beberapa ubahsuaian kepada loji telah dibuat, sekali lagi gagal ujian kedua. Perayu mendakwa kegagalan itu diakibatkan sisa tersebut tidak mematuhi jenis-jenis sisa yang dinyatakan dalam kontrak dan ia menolak untuk melakukan ujian selanjutnya berikutan perselisihan pendapat tentang siapa yang patut menanggung kos sedemikian. Responden telah menamatkan kontrak berdasarkan dakwaan penafian perayu tentangnya. Perayu telah merujuk pertikaian itu kepada timbang tara dengan berhujah, antara lain, bahawa memandangkan ia telah menyiapkan semua kerja fizikal untuk loji itu, ia berhak kepada baki harga kontrak yang disemak semula. Penimbang tara memutuskan, antara lain, bahawa: (a) perayu, sebagai kontraktor reka-dan-bina, tidak melaksanakan sebahagian besar kontrak itu tetapi telah melakukan pelanggaran yang besar kerana gagal membina loji yang sesuai bagi tujuan ia dibina; (b) kontrak antara pihak-pihak berbentuk komersial dan bukan 'research and development project'; (c) responden berhak atas tuntuan balasnya untuk RM9,238,770 sebagai kos untuk menggantikan bilik primer dan sekunder; (d) ukuran wajar untuk ganti rugi dalam kes ini adalah

'diminution in value' atau 'loss of utility' loji itu kerana ia sukar untuk menentukan kos pengembalian semulanya; (e) responden berhak untuk menamatkan kontrak di bawah fasal 53.1(iii) apabila perayu berterusan enggan membetulkan loji itu untuk memenuhi spesifikasi prestasi; dan (f) ujian yang wajar dan penyiapan loji itu bukan prasyarat untuk dilaksanakan oleh responden tentang haknya untuk menamatkan kontrak itu. Menurut ss 42 dan 37 Akta Timbangtara 2005 ('AT'), perayu merujuk kepada sepuluh soalan berkenaan award timbang tara kepada Mahkamah Tinggi untuk penentuannya. Mahkamah Tinggi enggan campur tangan dengan award itu kecuali untuk mengurangkan separuh — tanpa memberikan apa-apa sebab — ganti rugi yang diawardkan kepada responden untuk tuntutan balasnya. Mahkamah Tinggi memutuskan bahawa ukuran ganti rugi yang wajar dalam kes ini adalah berdasarkan 'cost of reinstatement' dan bukan 'diminution in value' loji itu. Dalam rayuan ini, responden telah merayu terhadap pengurangan dalam ganti rugi yang diawardkan untuk tuntutan balasnya manakala perayu telah merayu terhadap keseluruhan keputusan Mahkamah Tinggi.

Diputuskan, menolak rayuan perayu dan membenarkan rayuan balas responden:

(1) Hakim Mahkamah Tinggi telah salah arah dirinya apabila beliau campur tangan dengan dan mengurangkan ganti rugi yang ditentukan oleh penimbang tara untuk tuntutan balas responden. Jumlah ganti rugi dalam award yang diperintahkan menyebelahi responden telah dimasukkan semula. Penentuan tentang kuantum ganti rugi oleh penimbang tara adalah penentuan fakta. Beliau telah mengarahkan mindanya kepada prinsip-prinsip undang-undang yang betul dan telah menggunakan ujian untuk suatu yang merupakan pampasan munasabah dalam semua keadaan dengan mengambil kira kerumitan tertentu yang terdapat pada kes ini, iaitu fakta bahawa teknologi sedia ada dalam loji TOP itu dimiliki secara eksklusif oleh perayu dan bahawa pembetulan atau penggantian agak sukar dan mahal. Dengan mengurangkan jumlah yang diawardkan sebagai ganti rugi, hakim Mahkamah Tinggi telah melangkah ke arena penimbang tara dan melakukan penilaian semula yang beliau tidak layak untuk lakukan, kecuali pada mulanya memang terdapat rujukan yang betul di bawah s 42 AT. Hakim lebih kepada s 42(4)(b) AT yang memberi hak kepadanya untuk berbuat demikian. Mahkamah ini tidak bersetuju dengan itu. Kuasa untuk 'vary' suatu award di mana jelas terbatas dengan ayat pebuka s 42 untuk '... any question of law arising out of an award'. Penimbang tara ialah orang yang menguasai fakta dan mahkamah dalam melaksanakan kuasanya di bawah s 42 perlu berhati-hati untuk menyaring persoalan fakta 'dressed up' sebagai persoalan undang-undang (lihat perenggan 60–62).

(2) Pengecualian *Absalom* tidak terbatas kepada keadaan di mana mahkamah

dipanggil untuk mengendalikan hanya 'error of law on the face of the award'. Tiada sebab sah kenapa, dalam keadaan di bawah s 42 AT di mana 'any question of law arising out of an award' di hadapan mahkamah, pengecualian atau had sebegini juga tidak patut terpakai. Sekatan atau had yang diberikan oleh pengecualian *Absalom* adalah perlu dan relevan meskipun dalam keadaan s 42 agar 'reference on question of law' di bawah peruntukan tersebut tidak bertukar menjadi 'rayuan' semata-mata terhadap keputusan tribual timbang tara. Hakim Mahkamah Tinggi telah menerima hujah responden bahawa penimbang tara telahpun menentukan persoalan yang kontrak antara pihak-pihak adalah suatu yang komersial dan bukan projek kajian dan pembangunan dan justeru persoalan tersebut tidak lagi bersetuju dengan campur tangan kurial (lihat perenggan 26 & 31–33).

(3) Tiada kesilapan di pihak Mahkamah Tinggi atau penimbang tara dalam memutuskan bahawa responden mempunyai asas sah di sisi undang-undang untuk menggunakan fasal 53.1(iii) untuk menamatkan kontrak itu bebas daripada fasal 46. Tiada merit dalam aduan perayu bahawa relief fasal 53 adalah tertakluk kepada operasi fasal 46. Loji itu gagal memenuhi kuantiti rawatan sisa dan sasaran penggunaan bahan api. Mahkamah TInggi juga tidak terkhilaf memutuskan bahawa persoalan tentang prestasi substansial kontrak itu merupaka persoalan fakta dan oleh itu ia tidak boleh dengan sewajarnya dijadikan subjek rujukan kepada mahkamah. Mahkamah memutuskan bahawa penimbang tara dengan betul telah mengenal pasti undang-undang tentang prestasi substansial dan memutuskan bahawa pelanggaran itu satu yang merupakan asas kontrak, oleh itu menyisihkan doktrin prestasi substantial (lihat perenggan 45 & 48–50).

(4) Mahkamah Tinggi telah mengutarakan persoalan tentang 'testing and commissioning' dengan betul daripada perspektif prinsip-prinsip perundangan yang boleh terpakai berhubung apa yang atau boleh merupakan niat munasabah pihak-pihak dan kesimpulan yang dibuat adalah kukuh bahawa tidak timbul apa-apa 'condition precedent' dalam keadaan itu, yang diteliti oleh perayu (lihat perenggan 41).]

Notes

For a case on finding of fact, see 1(2) *Mallal's Digest* (5th Ed, 2015) para 1729.

Cases referred to

FR Absalom, Ltd v Great Western (London) Garden Village Society, Ltd [1933] All ER Rep 616, HL (refd)

Exceljade Sdn Bhd v Bauer (Malaysia) Sdn Bhd [2014] 1 AMR 253, HC (refd)

Finelvet AG v Vinava Shipping Co Ltd, The Chrysalis [1983] 1 WLR 1469, QBD (refd)

Ganda Edible Oils Sdn Bhd v Transgrain BV [1988] 1 MLJ 428; [1987] CLJ Rep 95, SC (refd)
Hoenig v Isaacs [1952] 2 All ER 176, CA (refd)
Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd [2015] 6 MLJ 126; [2015] 1 CLJ 617, CA (refd)
Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor [2008] 4 MLJ 157, CA (refd)
Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (refd)
Ruxley Electronics and Construction Ltd v Forsyth; Laddingford Enclosures Ltd v Forsyth [1995] 3 All ER 268, HL (refd)
Sapiahtoon v Lim Siew Hui [1963] 1 MLJ 305 (refd)
The Government of India v Cairn Energy India Pty Ltd & Anor [2011] 6 MLJ 441, FC (refd)

Legislation referred to

Arbitration Act 1996 [UK]
Arbitration Act 2005 ss 37, 42, 42(1A), (4)(b)
Contracts Act 1950 s 74

Appeal from: Originating Summons No 24C (ARB)-7–10 of 2013 (High Court, Kuala Lumpur)

Lim Chee Wee (Kamraj Nayagam and Loshinin Ramamoorthy with him) (Skrine) for the appellant.
Chandra Devi a/p Letchumanan (Rafidah Che Aziz with her) (Federal Counsel, Attorney General's Chambers) for the respondent.

Varghese George JCA:

INTRODUCTORY

[1] The appellant had pursuant to ss 42 and 37 of the Arbitration Act 2005 ('the AA') posed ten questions for determination by the High Court arising from a final award ('award') published on 15 July 2013 by the honourable arbitrator, Mr Chong Thaw Sing ('the arbitrator'). The appellant was the claimant in the arbitration proceedings.

[2] The learned judicial commissioner ('the learned judge') who dealt with those questions declined however, in net effect, to interfere with the award, save for a variation downwards of the quantum of damages awarded to the respondent on their counterclaim from RM9,238,770 to RM4,619,385.

[3] The notice of appeal filed in this appeal was against the whole of the decision of the learned judge. However in the memorandum of appeal and submission filed, the appellant did not pursue their appeal against the learned judge's decision to dismiss the appellant's application under s 37 of the AA, that is, to have the award set aside on the ground that there had occurred a breach of natural justice during the arbitral proceedings or in connection with the making of the award.

[4] The respondent had filed a cross-appeal in turn against that part of the learned judge's decision varying the damages awarded on their counterclaim to the lower sum of RM4,619,385.

BACKGROUND

[5] In 1997 the appellant had brought a proposal to build a laboratory plant to test a new thermal oxidation technology to treat municipal solid waste ('MSW') in Malaysia. A two ton laboratory plant was built in September 1997 at the complex of Malaysian Institute of Nuclear Technology Research ('MINT') and in 1998, the appellant also obtained some funding from the Ministry of Science, Technology and Environment to continue with further research and development of the thermal oxidation concept.

[6] On 7 January 2001, the appellant and the respondent entered into a contract for the design, construction, completion, testing and commissioning and guarantee for a solid waste treatment plant ('the contract') for a consideration of a lump sum of RM21,910,600. This treatment plant was to be located in Labuan and was to employ a new technology called thermal oxidation process ('TOP') that was proprietary to the appellant.

[7] In essence, TOP involved a two-step combustion of waste. Municipal waste was to be combusted in a primary chamber, which converted it into gas, which was then burnt off at very high temperature in a secondary chamber. The high temperature attained in the secondary chamber of the plant ensured that hazardous gases were removed from its emissions, dispensing with the need for expensive pollution control systems. The primary fuel of the plant was natural gas.

[8] The contract contained certain performance specifications for the treatment plant, relating to the daily capacity of the plant to treat a specified tonnage of unsorted municipal waste, the duration of each burn and the rate of consumption of natural gas. The waste characteristics were specified in the contract, and had been determined by the MINT, based on a survey conducted between November 1999 and July 2000.

[9] MINT was appointed by the respondent as its consultant to (inter alia) observe the testing and commissioning of the plant. The contract itself was administered by KLIA Bhd, which had been appointed by the respondent as its project management consultant.

[10] After the plant was constructed, it underwent its first testing and commissioning in May 2003. The plant failed to meet the performance specifications stated in the contract at this first testing. Certain design modifications were made to the plant and the plant underwent a second testing and re-commissioning in May 2004 ('the re-commissioning').

[11] The plant again failed to meet the performance specifications at the re-commissioning. The appellant claimed that the waste processed during the re-commissioning was outside the parameters of the waste characteristics specified in the contract and that this contributed to the failure of the plant to meet the performance specifications during re-commissioning.

[12] The appellant declined to undertake further testing and commissioning following a disagreement over who should bear the costs of such testing.

[13] The respondent subsequently on 11 May 2005 terminated the contract pursuant to cl 53.1(iii) of the contract and gave notice of forfeiture of the performance bond.

[14] The parties attempted without success to resolve the issues arising as between them. The appellant then issued to the respondent the notice to arbitrate on 30 June 2006.

[15] The stated consideration in the contract had increased subsequently through variations to RM28,397,042.53 ('the contract sum'). It was not in dispute that a sum amounting to RM25,766,378 had been paid by the respondent to the appellant.

THE TEN QUESTIONS, THE ARBITRATORS DECISION AND THE ANSWERS OF THE LEARNED JUDGE — SUMMARISED

[16] The following table summarises as against each of the ten questions, the respective relevant parts of the arbitrator's decision and the answers of the learned judge:

Questions	Arbitrator	High Court
1. Whether on a true construction of the contract between the parties, the plaintiff, having completed all the physical works called for under that contract, was entitled to the balance of the revised lump sum contract price of RM28,397,042.53, amounting to RM2,730,664.22.	Where a contractor commits a breach that goes to the root of the contract, it will not be open for the contractor to argue that there had been substantial performance of the contract (Hoenig v Isaacs).	No, on the basis that there was no substantial performance of the contract. (The arbitrator had identified the correct principle of law and had applied the same to the facts).
2. Whether it was incumbent on the respondant, having pleaded counterclaim for damages in the sum of RM13,000,000, to prove the quantum of damages claimed.	The respondent (as plaintiff in counterclaim) seeking substantial damages has burden of proving both the fact and amount of damages (Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd).	Yes. (The arbitrator had identified the applicable law).
(Note: Q 3, 4, 5 to be read together) 3. Whether the proper measure of damages for breach of contract resulting in a defective plant is the cost of reinstatement or the diminution in value.	Opted for 'diminution in value' as the measure for damages because it was considered difficult to ascertain reinstatement cost (Ruxley Electronics and Construction Ltd v Forsyth; Laddingford Enclosures Ltd v Forsyth).	The proper measure of damages in such circumstances should be cost of reinstatement not 'diminution in value' as the arbitrator did. (The arbitrator had however correctly identified the law on measures on damages).

4. Arising from the above, if the proper measure of damages is the cost of reinstatement, then, if that cost is not proven, is a tribunal entitled to award costs based on diminution in value, or is it confined to awarding nominal damages?	Nobody could say with certainty the cost of re-instating the plant. The technology of TOP belonged to the claimant. Guided by the test of 'reasonable damages', on the particular facts of the case, the appropriate measure would be akin to 'loss of utility'.	In such circumstances, a tribunal is not entitled to award cost based on diminution in value. Proof of damage is addressed by the milestone payments specified in the contract. The court held the relevant items of milestone payments in the contract would be actual cost of the primary and secondary chambers. (Only half the amounts allowed).
5. Whether it is allowable to calculate the measure of damages based on diminution in value/loss of utility by reference to the replacement cost of an item or part of a complex structure.	Arbitrator allowed replacement costs of the primary chamber and secondary chamber. Allowed RM9,238,770 under 'loss of utility'.	No, replacement cost would not be appropriate where the measure of damages is diminution in value.
6. Whether on a true construction, the contract between the parties was in fact a research and development project wherein the defendant assumed the risk of the technology not performing as expected.	Based on case law and evidence the arbitrator held that the contract entered into was a commercial design and build/turnkey contract and not a research and development project.	The specific question of law had already been referred to and determined by the arbitrator and was not open to challenge based on the Absalom exception (The Government of India v Cairn Energy India Pty Ltd & Anor).

7. Where a contract that specifies that municipal waste of specified characteristics and parameters is to be treated and also specifies the amount to be treated and the limits of energy consumption, is it a condition precedent to contractual performance that waste within the specified characteristics and parameters be provided for testing the functionality of the plant?	The appellant as a design and build contractor had the legal obligation to design and build a plant fit for the purpose it was constructed for. The appellant had not performed the contract as a result of the plant's failure to meet the performance specifications.	No. The waste characteristics must be read as forming an integral part of the performance specification. (Condition precedent need not always be express and could be implied. In this case the parties could not have intended that the performance specifications was to be excused if the waste characteristic did not conform to Table 4.3).

8. Whether it was a condition precedent to determination of the contract pursuant to cl 53.1(iii), that a proper testing and commissioning of the plant as prescribed by cl 46 of the contract, be carried out.	Successful testing and commissioning was a condition precedent to handing over the plant. Clause 46.2 required the contractor to remedy deficiencies. Substantial completion had not been achieved because of the appellant's plant's failure to comply fully with performance specifications. The respondent was entitled in law and in fact to terminate the contract in the face of the appellant's persistent refusal to rectify the plant to meet the performance specification.	No. There was no co-relations between cll 53.1(iii) and 46 of the contract (testing and commissioning). The arbitrator had correctly identified the law relating to termination of contract. Termination of contract pursuant to cl 53.1(iii) was lawful. (The appellant had requested the respondent to accept lower performance specification but the respondent had refused). (The arbitrator reviewed correctly the law related to repudiation of contracts and fundamental breach).

A B C D E F G H I

9. Whether the arbitrator failed to direct his mind to the contractual requirement that a proper testing and commissioning of the plant was a condition precedent to determination of the contract by the defendant and failed to make a finding that the testing and re-commissioning that was purported to have been carried out from 10–17 May 2004 under the supervision and direction of KLIA Bhd on behalf of the defendant was not a proper cl 46 testing and commissioning.	The arbitrator did not accept the appellant's contention that the re-commissioning was not properly carried out due to the adverse condition in which it was carried out; water content of the waste being higher than contracted specification.	As in above question. A proper testing and commissioning was not a condition precedent to the exercise of the right of termination. (The plant failed to meet the performance specifications.)
10. If the re-commissioning was not proper, was the purported determination of the contract based on the results of the improper testing and commissioning, valid?	Clause 53.1(iii) clearly entitled the respondent to terminate if the appellant refused to perform its obligations.	Yes. (The appellant had repudiated the contract by refusing to conduct and bear the costs of production run to establish that the plant met the contractual performance specifications). The appellant as contractor refused to conduct proper test and the right to terminate was properly exercised.

THE APPEAL

[17] The appellant's various contentions that the learned judge had misdirected himself on the questions of law posed to the court were advanced under the following three major heads summarised below:

(a) The nature of the contract. It was argued that the contract was a research and development project and not a commercial contract. The 'Absalom' exception was no longer applicable to delimit the scope of references on questions of law that may now be brought under s 42 of the AA;

(b) issues relating to testing and commissioning and whether the performance specifications had been met. It was contended that the 'condition precedent' as regards the characteristic of waste to be provided for the testing, had not been met and in any event, there had been substantial performance of the contract by the appellant. The termination of the contract premised on improper 'testing' was therefore invalid; and

(c) measure of damages. It was submitted that the respondent had not established on evidence that respondent had indeed suffered 'damages' and, therefore even if there had been a breach of the contract, the arbitrator and the learned judge ought only to have allowed 'nominal' damages to the respondent.

[18] The respondent's submissions were that the 'Absalom' exception was still applicable despite the new reference provisions of s 42 of the AA. The learned judge had not erred in the answers provided to the questions posed with respect to the issues of testing, commissioning and the provision of waste for testing, which in effect therefore endorsed the findings and rulings of the arbitrator on those issues.

[19] In respect of the respondent's cross-appeal and on the issue of the damages ordered by the arbitrator, it was argued that the correct measure of damages had been applied by the arbitrator and the 'quantum of damages' fixed by the arbitrator applying the test of reasonableness considering all the circumstances of the matter, was in any event, a question of fact outside the scope of court's permissible intervention pursuant to s 42 of the AA. Accordingly, the learned judge should not have interfered with the award of damages especially as the whole installation of the plant had not been completed to meet the performance specification required under the contract.

OUR DELIBERATION AND DECISION

[20] It was common ground between the parties that what would amount to a 'question of law', and further the approach the court should take in

determining any 'question of law' referred to it under s 42 of the AA, was now fairly settled with the decision of the High Court in *Exceljade Sdn Bhd v Bauer (Malaysia) Sdn Bhd* [2014] 1 AMR 253, and the endorsement of the approach therein identified, by the subsequent Court of Appeal decision in *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 6 MLJ 126; [2015] 1 CLJ 617.

[21] In *Exceljade*, Nallini Pathmanathan J (as she then was) had made reference to the decision of Mustill J in *Finelvet AG v Vinava Shipping Co Ltd, The Chrysalis* [1983] 1 WLR 1469 and stated:

> Mustill J, then goes on to consider the proper test or approach to be adopted by a court determining the substantive appeal which turns on a question of law arising out of the arbitration:
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> > ... Starting therefore with the proposition that the court is concerned to decide on the hearing of the appeal whether the award can be shown to be wrong in law, how is this question to be tackled? In a case such as the present, the answer is to be found by dividing the arbitrator's process of reasoning into three stages: *(1) The arbitrator ascertains the facts*. This process includes the making of findings on any facts which are in dispute. *(2) The arbitrator ascertains the law*. This process comprises not only the identification of all material rules of statute and common law, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached. *(3) In the light of the facts and the law so ascertained, the arbitrator reaches his decision*.
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> > In some cases, stage (3) will be purely mechanical. Once the law is correctly ascertained, the decision follows inevitably from the application of it to the facts found. In other instances, however, stage (3) involves an element of judgment on the part of the arbitrator. There is no uniquely 'right' answer to be derived from marrying the facts and the law, merely a choice of answers, none of which can be described as wrong.
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> > Stage (2) of the process is the proper subject matter of an appeal under the Act 1979. In some cases an error of law can be demonstrated by studying the way in which the arbitrator has stated the law in his reasons. It is, however, also possible to infer an error of law in those cases where a correct application of the law to the facts would lead inevitably to one answer, whereas the arbitrator has stated the law in his reasons in a manner which appears to be correct, for the court is then driven to assume that he did not properly understand the principles which he had stated.
>
> > Whether stage (3) can ever be the proper subject of an appeal, in those cases where the making of the decision does not follow automatically from the ascertainment of the facts and the law, is not a matter upon which it is necessary to express a view in the present case. *Pioneer Shipping Ltd V BTP Tioxide Ltd* [1982] AC 724 and *Kodros Shipping Corporation v Empresa Cubana de Fletes (No 2)* [1983] 1 AC 736, show that where the issue is one of commercial frustration, the court will not intervene, save only to the extent that it will have to form its

own view, in order to see whether the arbitrator's decision is out of conformity with the only correct answers. This is part of the process of investigating whether the arbitrator has gone wrong at the second stage. *But once the court has concluded that a tribunal which correctly understood the law could have arrived at the same answer as the one reached by the arbitrator, the fact that the individual judge himself would have come to a different conclusion is no ground for disturbing the award*. (Emphasis added.)

[22] In the *Perwira Bintang*'s case, Ariff JCA speaking for this court affirmed the *Chrysalis*'s approach quoted in *Exceljade* and noted further:

The Issue of Recognising What Is A Question Of Law

[58] ...

[59] Mustil J in *The Chrysalis*, was of course referring to the English Arbitration Act 1979 (since amended) where the procedure is that of an 'appeal' with leave, but the general principles and guidelines analysed are very relevant for our purposes. To this extent, we agree with the view expressed in *Exceljade*, in highlighting the proper approach.

[60] In practical terms, we are persuaded that we should be looking at *stage (2) of the process of reasoning* as the proper focus of the inquiry under s 42, which *will mean ascertaining not so much a clear position of the 'law' without regard to underlying facts, but, as analysed, the arbitrator will be ascertaining the 'law' as a process comprising 'not only the identification of all material rules of statute and common law, but also the identification and interpretation of the relevant parts of the contract*, and the identification of those facts which must be taken into account when the decision is reached'. Typically, this process will involve a mixed consideration of relevant statutory rules, case laws and legal principles, and an identification of the relevant facts on which to apply the 'law'. (Emphasis added.)

[23] We need to place emphasis on one aspect of the three stage process that is of particular significance to the issues at hand in this appeal. It is this that once the court dealing with a reference unders 42 of the AA had under stage 2 of the process taken the view that the arbitral tribunal had understood, stated and applied the correct law, the court under the stage 3 process had to consider further the range of possible correct answers open to the tribunal. If the answer preferred by the tribunal was well within such identified range, the court answering the question of law before it would not intervene, although the individual judge considering the question would have been inclined to come to a different conclusion.

[24] This position as highlighted in the preceding paragraph was consonant with the *raison d'etre* for the choice by the parties of arbitration as the specific mode for their dispute resolution, namely, the underlying principles of 'party autonomy', and the finality and binding nature of the arbitral decision, to which they had freely consented. The advent of the AA (brought into force on

15 March 2006) has also strengthened the position in law that there ought to be only minimal intervention by the courts in respect of arbitral proceedings or the outcome of arbitration.

[25] Also of particular note was the further overriding consideration now imposed upon the court by virtue of s 42(1A) of the AA, namely, to ensure that unless the question of law substantially affected the rights of one or more of the parties, the court was mandated to dismiss such reference proffered to the court.

NATURE OF THE CONTRACT — ABSALOM EXCEPTION

[26] It was the respondent's contention that Question 6 posed to the court (ie whether the relationship between the appellant and respondent was a research and development project or a commercial contract) was in substance the same question that had been specifically posed to the arbitrator for determination. Accordingly, it was not open to the court in the reference to re-examine that very same question. The learned judge accepted that contention of the respondent and ruled that this question posed was no longer amenable to curial intervention.

[27] The respondent relied on the principle that has come to be known as the *Absalom* exception and referred to the decision of the Federal Court in *The Government of India v Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441, affirming the same particularly the following passage:

> [29] This court in *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401; [2004] 1 CLJ 743 upheld the distinction that was made in *Sharikat Pemborong* in the following terms — 'As to the determination of whether the award has been improperly procured, this must depend on the issues or the questions that have been referred to the arbitrator. It is from these issues or questions that the arbitrator has to make findings of fact on the evidence adduced before him and more often than not, questions of law arise from his findings of fact, it is under these circumstances that Raja Azlan Shah J in *Sharikat Pemborong* sounded a warning that reads as follows — 'It is essential to keep the distinction between a case where a dispute is referred to an arbitrator in the decision of which a question of law becomes material from the case in which a specific question of law has been referred to him. The wealth of authorities make a clear distinction between the two classes of cases and they decide that in the former case the court can interfere if and when any error appears on the face of the award but in latter case no such interference is possible upon the ground that the decision upon the question of law is an erroneous one'.'
>
> [30] With respect we are not persuaded that we should depart from the long line of authorities holding such a distinction. *Thus, where a specific matter is referred to arbitration for consideration, it ought to be respected in that 'no such interference is possible upon the ground that the decision upon the question of law is an erroneous one'.*

> However, if the matter is a general reference, interference may be possible 'if and when any error appears on the face of the award' (see: *Sharikat Pemborong Pertanian*). (See also: *King v Duveen* [1913] 2 KB 32 and *Absalom Ltd v Great Western (London) Garden Village Society, Ltd* [1933] AC 592.) (Emphasis added.)

Richard Malanjum CJ (Sabah & Sarawak) further observed there as follows:

> [52] We note that the arbitrators were faced with a question on the construction of a clause in an agreement. From the reading of it, no doubt it could be given two interpretations — one in favour of the appellant and one in favour of the respondents. For that very reason, the matter was sent for arbitration. The fact that the learned arbitrators took one approach in interpretation (which was in favour of the respondents) over the other cannot be a ground for challenge.
>
> [51] And as Scrutton LJ put it '... if you refer a matter expressly to the arbitrator and he makes an error of law you must take the consequences; you have gone to an arbitrator and if the arbitrator whom you choose makes a mistake in law that is your look-out for choosing the wrong arbitrator; if you choose to go to Caesar you must take Caesars's judgment' (see *African & Eastern (Malaya) Ltd v White, Palmer & Co Ltd* (1930) 36 LI L REP 113; cited with approval by the Court of Appeal in *Dato' Teong Teck Kim & Ors v Dato' Teong Teck Leng* [1996] 1 MLJ 178 ... (at p 452).

[28] The appellant's argument before us (as was also before the learned judge), was that the *Absalom* exception no longer applied in the light of the present s 42 of the AA. It was urged upon us that the *Absalom* exception operated only where there was an error of law 'on the face of the award' and that in *Exceljade* the learned judge had held that the primary consideration under s 42 of the AA now would be whether the question of law or error of law arose out of the award.

[29] The learned judge was however not persuaded and held that nothing cited in the cases (including *Exceljade*) supported the proposition that the *Absalom* exception no longer applied in Malaysia. Construction of a contract was question of law no doubt but where a specific matter had been referred for determination in the arbitration itself, no interference by the court was possible on the grounds that the decision of the arbitrator on that question was an erroneous one; only in extremely limited circumstances would it be open to challenge, like, as identified by the Federal Court on *Ganda Edible Oils Sdn Bhd v Transgrain BV* [1988] 1 MLJ 428; [1987] CLJ Rep 95, where 'the arbitrator has proceeded illegally, as for instance, by deciding on evidence which was not admissible, or on principle of construction which the law does not countenance'.

[30] It was also contended before us by the appellant that the *Absalom* exception was in any event only recognised under common law (ie in the absence of statute law) because the power of the court under common law parameters was a drastic one, that is, only to set aside the entire award when an

error of law was discovered; there was no power to order any other relief. However under s 42 of the AA, it was argued, as there was a range of relief open to the court to order, the court was not precluded from intervening where a question of law arising out of the award had been wrongfully decided by the arbitrator. For that reason, it was submitted that the learned judge should have given consideration to that question and not be restricted by the *Absalom* exception.

[31] On our part having given consideration to the submission of respective counsel we were not convinced that that *Absalom* exception was confined to situations where the court was called upon to deal with 'error of law on the face of the award' only. There was no valid reason why, in a situation under s 42 of the AA, where '... any question of law arising out of an award' was before the court, such an exception or limitation ought not to also apply.

[32] In our considered view such a restriction or limitation as afforded by the *Absalom* exception, was still necessary and relevant even in a s 42 of the AA scenario as well. This was so in order that the 'reference on question of law' under that provision was not turned into a wholesale 'appeal' against the arbitral tribunal's decision or ruling. The court had to guard that the proceedings brought to court related to arbitrations, especially post-award, were not in substance and effect an appeal or a re-hearing, or like here, providing an opportunity for regurgitation of the competing arguments on that specific issue of law that had by agreement of the parties been chosen and referred to the arbitral tribunal for determination conclusively. The fact that the arbitrator took one approach in interpretation over the other could not be a cause for further complaint in a reference proceedings under s 42 of the AA too. To allow the appellant to re-litigate this issue would have the effect of opening the floodgates to allow what was in substance an appeal couched as a question of law.

[33] In any event, we also note that the arbitrator had extensively dealt with this specific question referred to him and had from paras 29–53 of the award gone on to set out the current legal principles governing the construction and interpretation of legal instruments. The arbitrator had given due consideration to the materials on relevant law referred to by both parties and also the respective submissions made on the divergent propositions canvassed, before coming to the conclusion that the contract was a commercial contract between the parties.

TESTING, PERFORMANCE SPECIFICATION

[34] It was the appellant's contention before the court that the provision of types of waste for testing or determination of performance of the plant had to

conform to prescribed waste characteristics as was found detailed in Table 4.3 of the contract and this was a condition precedent that had to be fulfilled first for any testing to be acceptable.

[35] The arbitrator had accepted the respondent's argument that the contract was a turnkey contract and it always remained the plaintiff's responsibility to ensure that the completed plant was capable of treating whatever waste that was collected by the Labuan municipality; yet the plant had to still meet the specification stipulated with regard to the amount (quantity) of waste to be treated and the limits of energy consumption in the process.

[36] The arbitrator's comment in this respect was captured in the following excerpt:

> Here, the turnkey contractor is obliged to design and built the Labuan TOP Plant to treat a largely non-homogenous and seasonally varied unsorted municipal solid waste or MSW. The claimant's plant not only has to handle unsorted MSW that has significant sectorial difference in waste characteristics, see Table 4.3 below, but it must also be able to treat waste that are varied seasonally ie waste characteristics during the various festive periods, the monsoon period, etc.
>
> [A]s the turnkey contractor, the claimant's legal obligation is to design the plant fit for the purpose for which it was contracted for.

[37] The learned judge acknowledged that the arbitrator had reviewed the correct applicable law relating to turnkey and design and build contract. However the learned judge did not agree with the position of arbitrator that the mere fact that it was a turnkey/design and build contract by itself meant that the plant ought to be capable of processing waste of whatever characteristic; if that was the case there was no need to specify the detailed characteristics in Table 4.3, said the learned judge.

[38] Following that analysis the learned judge then dealt with the question whether it was a condition precedent that the waste produced for processing had to meet the specified waste characteristics. After accepting that a condition precedent could be implied (and not necessarily be express always) as a matter of law, the learned judge, correctly in our view, noted the key here was to determine whether it was the intention of the parties to include such a term in the performance of the contract.

[39] The learned judge's conclusion was that '... the parties could not have intended for the (obligation of the appellant) to deliver a waste treatment plant that conformed to the performance specifications to be excused if the waste characteristics did not conform to Table 4.3'. Accordingly, the learned judge's answer nevertheless was that the provision of waste within the specified

characteristics and parameters was NOT a condition precedent for determining the functionality of the plant as contracted for.

[40] The learned judge noted further that following the failed re-commissioning, the obligation of the plaintiff to deliver a plant meeting the performance specifications remained executory and until the plant met those performance specification fully, the appellant could not be considered to have discharged the appellant's obligations under the contract.

[41] Here therefore, notwithstanding that the learned judge had disagreed with the arbitrator's emphasis or reliance on the turnkey/design and build nature of the contract, the learned judge's decision not to set aside or otherwise interfere with the award was, in our assessment, sustainable and justified. The learned judge had addressed the question posed to the court correctly from the perspective of the applicable legal principles as to what was or could have constituted the reasonable intention of the parties in the factual context of the matter. The conclusion reached was sound that there did not arise any 'condition precedent' in the circumstances, as canvassed by the appellant.

TERMINATION OF THE CONTRACT

[42] The nub of the appellant's contention underlying Questions 9 and 10 posed in the reference was that there was a correlation between cl 53.1(iii) and cl 46 of the contract and unless there was a proper testing completed the respondent could not invoke their right to determine the contract.

[43] The learned judge reviewed the award and made specific note of the following:

(a) that the arbitrator had established as a fact that following the failed re-commissioning, the appellant had appealed to the respondent to accept a lower performance standard but this had not been acceptable to the respondent;

(b) it was also accepted as a fact that it was the appellant's refusal to bear the costs of further production trial runs that had scuttled further testing or resolution of the controversy;

(c) the arbitrator had properly construed cl 46.1 when it was ruled that the conformance of the test results with the performance specifications was a condition precedent only in so far as the handing over of the plant was concerned;

(d) the requirement under cl 46 to obtain a successful testing and commissioning of the plant in compliance with the performance

specifications was not a mere 'warranty' but amounted to a 'condition' of the relationship between the parties which went to the root of the contract; and

(e) the arbitrator had rightfully placed emphasis on cl 46.2 which was in the following terms:

> 46.2 Failure to Pass Test
>
> In the event the installation failing to pass these tests, the Contractor should take such measures as are necessary to remedy the installation including the replacement of part or whole of the equipment installed, so as to pass all necessary tests. The whole installation shall not be considered as complete until all such tests have been passed.

This imposed a duty on the appellant to remedy all deficiencies encountered.

[44] Considering the award as a whole and, considering further that following the unsuccessful re-commissioning the appellant's obligation to deliver a plant that complied with the performance specifications remained executory at the material time, the learned judge held that the arbitrator had not erred in law in concluding that the contract was lawfully terminated pursuant to cl 53.1(iii) for persistent refusal to rectify the plant to meet the performance specifications and could not be argued to be predicated on proper testing and commissioning of the plant (as per cl 46) had been carried out.

[45] We did not find any error on the part of the learned judge, or for that matter on the part of the arbitrator, that on the facts that had been established in the arbitration, the respondent had a valid basis in law to invoke cl 53.1(iii) to terminate the contract independent of cl 46. The argument of the appellant that the right to terminate could not be availed of until testing and commissioning had been successfully met as per cl 46 could only invariably lead to a totally unreasonable scenario, where the respondent would be held captive and tied down to the contract for an indeterminate period of time while the appellant could delay until the terms for testing met the performance specification. This could not have been the commercial intent behind the contract. The plant had failed to meet the quantity of waste treated and consumption of fuel targets. We therefore did not find any merit in the appellant's complaint that article 53 relief was subject to the operations of cl 46.

SUBSTANTIAL PERFORMANCE

[46] The appellant's contention that there had been substantial performance of the contract and therefore there could not be any valid grounds for termination and/or for denial of the balance of contract sum still outstanding and allegedly due to the appellant could be conveniently considered here (Question 1). The finding of the arbitrator was set out as para 86 of the award

and was as follows:

> ... the term on 'testing and commissioning' in this contract is very clearly a mandatory requirement to be fulfilled before the plant is fit for handing over to the respondent. Clause 46.2 of the contract emphasised the mandatory nature of the testing and commissioning by prescribing the action required of the contractor if the plant fails to pass the test. This underscores that *the failure to meet the performance specifications goes to the root of the contract*.
>
> ...
>
> *Without the handing over of the plant to the respondent, there is not substantial completion* and the claimant is not entitled to the full balance of the contract sum. (Emphasis added.)

[47] The arbitrator had in the award noted that the notice of intention to terminate the contract (issued prior to termination and demanding the breach to be remedied) had stated that the plant had failed to meet the following performance specifications:

(a) TOP had demonstrated an operating capacity of 29.4 tons per day instead of the required 40.0 tons per day of unsorted MSW; and

(b) the annual consumption of natural gas was 213,224 million BTU instead of the required 31,000 million BTU pa.

[48] The learned judge noted that whether any substantial performance of contract had actually been achieved was a question of fact and therefore could not be properly made a subject of a reference. What was only in issue before the court was however whether the arbitrator had correctly identified the law on substantial performance. The court said that the arbitrator had correctly identified the principles on this point laid out in the decision of *Hoenig v Isaacs* [1952] 2 All ER 176 which had found support in our courts in the decisions of *Sapiahtoon v Lim Siew Hui* [1963] 1 MLJ 305 and *Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor* [2008] 4 MLJ 157.

[49] The learned judge held that the converse of the ratio in *Hoenig* necessarily applied in this case, namely that if the breach was one that goes to the root of contract, the doctrine of substantial performance was displaced; the employer of the project in such circumstances was not be obliged to pay the contracted price or any part thereof.

[50] On our part, we were satisfied that the learned judge had satisfactorily analysed all related matters in the award and the answer given by the court to the question posed by the appellant was not in error at all.

MEASURE OF DAMAGES

[51] It was the appellant's contention that even considering that there had been a breach of the contract, the proper measure of the damages to be adopted should be 'reinstatement costs'. It was submitted that this 'replacement costs' had to be established by good evidence, failing which the respondent was only entitled to be awarded 'nominal' damages. It was the appellant's further submission that the respondent had in this case failed to adduce any proof of damage suffered in the matter.

[52] As summarised and tabulated earlier the arbitrator had opted to use 'dimunition in value' (also interchangeably stated as 'loss of utility') as the appropriate measure since as the arbitrator stated it was difficult in the circumstances of this particular case to ascertain what the actual replacement cost would be. The learned arbitrator had relied on the principles that had been discussed in the House of Lord's case of *Ruxley Electronics and Construction Ltd v Forsyth; Laddingford Enclosures Ltd v Forsyth* [1995] 3 All ER 268 and quoting Lord Mustill in particular, the arbitrator stated that in such circumstance the test of reasonableness played a central part in determining the basis of recovery.

[53] The learned judge in answer to the question posed in the reference noted that the arbitrator had correctly identified the law on the issue of measure of damages to be applied in this case. Nevertheless, the learned judge opined that the arbitrator should have retained the 'cost of reinstatement' as the proper measure and not adopt the 'dimunition in value' (equated to 'loss of amenity') approach in determining the quantum of damages to be amended.

[54] The learned judge was somewhat ambivalent here. His Lordship accepted that the arbitrator was entitled in law to select dimunition in value or loss of amenity because it was the most reasonable measure of damage, but not because it was the easiest means to ascertain the damages. The learned judge preferred 'reinstatement cost' as the most appropriate measure in any event.

[55] Interestingly, the learned judge then went on to rule that the 'reinstatement costs' in this case would be cost to either replace or modify the primary and secondary chambers stating further '… the milestone payments would be representative of the actual costs of the primary and secondary chambers'.

Nonetheless, the learned judge was willing to accede to the appellant's counsel's submissions that to award the full costs of the chambers would not be correct as there had not been a total failure of consideration on the part of the appellant. The learned judge proceeded to reduce the quantum of damages to

be awarded to half the amount of the milestone payments in respect of the primary and secondary chambers (in contrast to the full cost awarded by the arbitrator, that is).

[56] The learned judge did not offer any reasons why he had opted to use a clinical cut of half the amount of the milestone payment for the primary and secondary chambers, as reflecting the reinstatement costs in this case.

[57] This was where the respondent's submissions in support of their cross-appeal had to be considered. They were essentially:

(a) the approach taken by the arbitrator was consistent with s 74 of the Contracts Act 1950 which required a determination of what was a 'reasonable' award of compensation (which naturally arose in the normal course of things from the breach) in the given particular situation and the arbitrator had after identifying the range of measures available applied the test of 'reasonable damages' recognised in law in this instant situation;

(b) the damages for breach of contract ought to reflect as accurately as possible the loss sustained because the claimant did not get what he bargained for and the assessment of this loss was a question of fact and degree (Lord Bridge of Harwich and Lord Jauncey of Tullichettle in *Ruxley*);

(c) the arbitrator had given due consideration to the issue of 'mitigation of damages'. In this case the arbitrator had correctly noted that the technology of the TOP plant belonged to the appellant and there was a very narrow option available to engage a third party to rectify the plant, which in any event would if undertaken would incur cost of a hefty amount. The respondent had in their claim stated the sum of RM13m as this was the sum to be incurred if the respondent had to enter into a new contract with one XCN Technology using a different technology altogether; and

(d) in effect what the arbitrator had awarded the respondent in the sum of RM9,238,770, albeit termed as 'loss of utility', was in substance 'reinstatement of costs' as that sum would fairly represent the cost to replace or even modify the primary and secondary chambers of the Plant to meet the performance specifications.

[58] It was urged upon us for the respondent that there was no longer an issue as to the respondent being entitled on their counterclaim to be awarded reasonable damages for the failure of the plant. The measure of damages employed was also within approved principles of law. It followed then that the quantification of such damages based on the context of the circumstances

surrounding this case, was a determination of fact. Accordingly, it was submitted that the learned judge ought not to have interfered with the award as it amounted to an 'appeal' against the arbitrator's finding of fact and did not amount to a question of law to be brought as a reference under s 42 of the AA. In any event, the arbitrator had reasoned out why the damages based on the milestone payment for the primary and secondary chambers was in the circumstances the correct measure of damages as the breach was of a fundamental nature going to the root of the contract.

[59] It would be recalled that the appellant's submission before us was that since the 'loss' or 'damages' on the basis of 'replacement costs' to be incurred had not been shown by the respondent on evidence, the respondent would only be entitled to 'nominal' damages and accordingly the damages awarded by the arbitrator and the varied sum of damages imposed by the learned judge should be set aside.

[60] Having considered the respective submissions it was our considered view that the determination of the quantum of damages by the arbitrator was a determination of fact. The arbitrator in coming to his determination had addressed his mind to the right principles of law. There was a range of possible measures of damage recognised and available in law open to the arbitrator. The arbitrator had applied the test of what would be a reasonable compensation in all the circumstances of the matter considering the particular complexity attached to this case, namely the fact that technology inherent in the TOP plant exclusively belonged to the appellant and rectification or replacement would prove to be difficult and costly.

[61] By reducing the sum awarded as damages, with respect the learned judge, in our view, had stepped into the arena of the arbitrator and had undertaken a reassessment, which the learned judge was not entitled to, unless there was in the first place a proper reference under s 42 of the AA. The learned judge leaned on the provision of s 42(4)(b) of the AA as entitling him to do. We could not agree to that. The power to 'vary' an award given there was clearly circumscribed by the opening words of the s 42 of the AA itself where it had been restricted to '... any question of law arising out of an award'. The arbitrator was the master of facts and the court in exercising its powers under s 42 of the AA had to be wary to sieve out questions of fact 'dressed up' as question of law.

[62] We therefore found merit in the cross-appeal of the respondent that the learned judge had misdirected himself when he interfered with and went on to reduce the award of damages determined by the arbitrator. The amount of damages in the award ordered in favour of the respondent should accordingly be restored.

CONCLUSION

[63] Sections 37 and 42 of the AA are the two main avenues made available under the provisions of the AA to bring a post-award challenge. Provisions similar to s 42 of the AA were not part of the UNCITRAL Model Law recommendations. We have on the one side those who advocate a stance that there should be absolute judicial restraint and deference to the finality of an arbitral award. They say that the parties agreeing to arbitration were agreeing to the arbitrator getting it wrong and there should be total non-intervention by the civil courts.

On the other end of the swing of the pendulum were those who argue that national courts, particularly in domestic arbitration, should not abdicate their sovereignty to have complete supervisory and appellate oversight over subordinate tribunals, which they equate the arbitral process to be one. Hence, the views expressed yet by some that the checks on arbitral awards should be structured and tested more in the nature of 'judicial review' proceedings that is currently on the rule book.

[64] The legislative intent behind allowing reference to be brought on questions of law (s 42 of the AA) to the court appear to be to cut a middle path between those divergent positions, namely, to allow the courts a limited role to re-examine issues or questions of law arising out of an award. It is pertinent in this regard to note our statute use the term 'reference' and not 'appeal' (as found in the English Arbitration Act 1996). It is also equally pertinent to highlight that provision of similar purport in England, New Zealand and Singapore (domestic arbitration) require the 'leave of court' to be first obtained as a preliminary step before proceeding with such 'appeal' or 'reference' on a question of law itself. Such 'subject to leave of court' provisions are clearly designed to 'sieve out' what are in essence appeals on facts or otherwise frivolous or irrelevant questions of law.

[65] The AA did not provide for such a filter mechanism. We now however have s 42(1A) of the AA which gives the power to the courts to dismiss a reference unless the 'question of law' posed '… substantially affects the rights or one of the parties'. The scope of this provision has still to be tested but it might well allow a party opposing a reference application to seek to have, if not the whole proceedings, then at least some of the questions raised to be struck out at the preliminary stages of the proceedings itself, on that ground.

[66] The pressure was definitely on the courts therefore to be ever vigilant and to resist attempts to engage the courts in a review of the arbitral award on its merits, akin to an 'appeal', often camouflaged masterly as 'questions of law'. There was no room for any dispute that the curial function of the court under s 42 of the AA was only intended by the Legislature to be extended to questions

of law per se, that too, which would affect substantially the rights of one or the other party.

[67] In our assessment, in this instant reference before the court, the learned judge had admirably found his way through the minefield laid before him to, in the main, uphold the integrity of the award and exercise the sense of balance required in post-award intervention by the courts. We only did not agree with the learned judge in the reduction made to the quantum of damages that had been reasoned out and awarded by the arbitrator to the respondent.

[68] Based on the reasons discussed and elaborated above, we dismissed the appeal and allowed the cross-appeal. We also ordered that the appellant pay the respondent cost of this appeal which after further submission, we fixed at RM30,000.

Appellant's appeal dismissed and respondent's cross-appeal allowed.

Reported by Ashok Kumar